SUPREME COURT, U. S.
FILED
OCT 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-400

CONSTANTINE BALLAS, AS PRESIDENT OF LODGE 1894, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO,

Petitioner,

vs.

MATTHEW McKIERNAN, JOHN P. CARROLL, and JOSE ANTONIO COLON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petitioner prays that a Writ of Certiorari issue to review the judgment and decision of the New York State Court of Appeals dated July 10, 1974.

Opinions Below

The opinion of the New York State Court of Appeals is reported at 35 N. Y. 2d 14 (1974) [Appendix A 1-7]. The Opinion of the Appellate Division, Second Department of the New York State Supreme Court is reported at 41 App. Div. 2d 131, 341 N. Y. S. 2d 520 (2d Dept. 1973) [App. *C 1-12]. The decision of the Appellate Term of the New York State Supreme Court for the 2nd and 11th Judicial Districts is not officially reported [App. E 1-3]. The

* "App." refers to the Appendix to this petition.

opinion of the Civil Court of the City of New York, Queens County is reported at 63 Misc. 2d 432, 312 N. Y. S. 2d 204 (Civ. Ct. Queens Co. 1970) [App. F 1-9].

Jurisdiction

The Judgment of the New York State Court of Appeals was entered on July 10, 1974. The Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3).

Questions Presented for Review

1) Whether a union which seeks by action in a state court to collect a disciplinary fine which it imposes on a member who, without resigning from membership, actively and publicly supported and campaigned for a rival union as collective bargaining representative, violates the "freedom of association" provision of the Railway Labor Act or the "free speech" provision of the Labor-Management Reporting and Disclosure Act.

2) Whether the fact that a union member holds membership as a result of a union shop provision in a collective bargaining agreement pursuant to the Railway Labor Act (45 U. S. C. §152 [Eleventh] (a)) affects the right of the union to impose such a fine upon him.

Statutes Involved

1. Section 151(a) of the Railway Labor Act (48 Stat. 1186, 45 U. S. C. Sec. 151(a)) provides, in pertinent part:

> "The purposes of the chapter are . . . (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employ-

ment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self organization to carry out the purposes of this chapter; . . ."

2. Section 152 (Eleventh) of the Railway Labor Act (64 Stat. 1238, 45 U. S. C. §152 (Eleventh)) provides, in pertinent part:

> "ELEVENTH. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted——
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformily required as a condition of acquiring or retaining membership."

3. Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959, as amended (73 Stat. 522, 29 U. S. C. §411(a)(2) provides:

> "(2) Freedom of Speech and Assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

Statement of the Case

A. The Facts.

The petitioner Union ("IAM") has for many years been the elected collective bargaining representative of mechanics and other categories of ground employees employed by various airlines using the facilities of LaGuardia and Kennedy Airports.

The three respondents were aircraft mechanics, two of whom were employed by National Airlines and the other by Eastern Airlines. Each of them had become a member of the IAM by virtue of the union shop provisions contained in the collective bargaining agreements in effect between the IAM and the airlines. Those provisions, authorized by the Railway Labor Act, required that as a

condition of continued employment an employee within the bargaining unit must become a Union member within 60 days after the co mencement of his employment and maintain such membership. Union membership is regulated by the IAM's Constitution and By-Laws.*

After varying periods of employment and membership in the IAM, each of the three respondents became an active member of a rival union, Aircraft Mechanics Fraternal Association ("AMFA"). In July, 1967, they publicly and overtly organized in behalf of AMFA in a representation election campaign in which AMFA sought to displace the IAM as the bargaining representative of the aircraft mechanics employed by National Airlines. During the period of campaigning and soliciting support in behalf of the rival union, the respondents made no attempt to resign from IAM membership, nor did they seek in any way to be relieved of their status or obligations as members.

Despite respondents' efforts while still members to undermine the majority status of the IAM, the IAM was successful in the election and was certified anew as exclusive bargaining agent. Thereafter, individual members of the IAM filed charges against the three respondents based on their violation of Section 3 of Article L of the IAM Constitution, which provides in pertinent part:

> "The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or expulsion from membership . . ."
>
> "Attempting, inaugurating or encouraging secession from the IAM or advocating or encouraging or attempting to inaugurate any dual labor movement . . ."

* Two of the respondents at one time had taken active membership roles by holding various union offices.

Written notice of the specific charges was given each respondent and hearings were duly held before the Union trial committees. The trial committees recommended that each of the respondents be found guilty of violating the constitutional proscription against "dual unionism," and recommended fines ranging from $1,000 to $3,000. At a membership meeting a majority of the members found each respondent guilty, but failed to recommend fines for two of the three respondents. On appeal, the International President of the IAM accepted the initial recommendations calling for fines against all three respondents.

When the respondents refused to pay the fines, the Union instituted proceedings for their collection in the New York City Civil Court (Queens County).

B. How the Federal Questions Were Presented.

The Federal questions sought to be reviewed were presented initially in the Civil Court by respondents' answers to petitioner's complaints to enforce the disciplinary fines [App. G 1-7].

In respondents' affirmative defenses to petitioner's complaints, it was alleged that enforcement of the fines was contrary to the provisions of the Railway Labor Act and the Labor-Management Reporting and Disclosure Act. These questions were argued in briefs and affidavits presents to the Civil Court on respondents' motion and petitioner's cross-motion (the cases were consolidated for purposes of the motions) for partial summary judgment on the issues of law. The Civil Court granted partial summary judgment in favor of petitioner as to liability, finding that the respondents enjoyed full Union membership under the Union shop provisions of the Railway Labor Act and that under the prevailing Federal labor policy, the Union had the right to prescribe its own rules

respecting acquisition or retention of membership, to impose fines and to bring suit for their collection against members who violate the provisions of its constitution and by-laws [App. F 3-6]. The Court ordered that the issues of the reasonableness of the fines (and the internal trial procedure) be left to the Trial Court as issues of fact [App. F 6]. On appeal to the Appellate Term of the Supreme Court for the 2nd and 11th Judicial Districts, that Court reversed and granted summary judgment for the respondents, stating only that it was unlawful to impose a fine for dual unionism [App. E 1]. The Federal questions were again briefed and argued in conjunction with petitioner's appeal to the Appellate Division, of the Supreme Court, Second Department which affirmed the decision and order of the Appellate Term. The Appellate Division held, in general terms, that the imposition of fines for dual unionism violated the free speech provision contained in Title I of the Labor-Management Reporting and Disclosure Act [App. C 12]. It granted leave to appeal to the New York State Court of Appeals. The Court of Appeals, after considering the parties' arguments as to the applicability of the Railway Labor Act and the LMRDA, affirmed the order of the Appellate Division, thus holding that the Union could not impose fines on its members for advocating dual unionism [App. A 7].

C. The Decision Below.

The Court of Appeals, in denying the enforcement of union discipline through fines against members supporting a rival Union, concluded that the enforcement of a provision against dual unionism would preclude or deter employees (who are members but not officers of the Union *)

* Since two of the respondents were no longer serving in their former capacity as officers at the time they engaged in dual unionist activity, the court noted that it did not reach the question of whether the union could discipline its *officer* members for such conduct.

from seeking by otherwise legitimate means to replace an incumbent collective bargaining representative with another, and that such discipline is not reasonably required for the protection of the legitimate interests of the incumbent Union. Therefore, such conduct on the part of the IAM violated the "free speech" provisions of the Labor-Management Reporting and Disclosure Act (29 U .S. C. §411(a)(2)) [App. A 5].

Additionally, the Court concluded that the conduct of the IAM denied its members the right of freedom of choice as to their bargaining representatives, thereby limiting the freedom of association among employees, in violation of the Railway Labor Act (45 U. S. C. §151(a)) [App. A 5].

Reasons for Granting the Writ

The decision of the Court of Appeals is a major departure from the established national labor policy which recognizes that the chosen union must have the authority to protect against erosion of its status as collective bargaining representative through reasonable discipline of members who violate its legitimate rules. Union members who openly support, and campaign in behalf of, a rival organization present the gravest threat to the Union's continued existence as an institution by undermining its majority status. This concern has almost invariably prompted unions to provide in their constitutions and by-laws for the imposition of disciplinary penalties on members who engage in dual unionist conduct. The decision of the Court of Appeals in denying enforcement of such discipline has serious potential effect on the national labor policy which is intended to develop and assure the stability of labor organizations. In the light of the importance of the questions presented, review by this Court is clearly warranted.

(A) The Decision of the Court of Appeals Conflicts With the Principle, Embodied in Decisions of This Court, That Unions May Impose and Collect Disciplinary Fines for Breaches of Legitimate Union Rules.

The Court has previously examined the question of a union's right to impose discipline on its members who have violated union rules. These cases have arisen in the context of the National Labor Relations Act; nevertheless the rationale of each of those cases is applicable to the case at bar.*

In *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), the question presented was whether a Union which fined members for crossing union picket lines established in support of a lawful strike and which attempted to collect the fines by Court action, restrained or coerced employees thereby in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act. The Court held that imposition of the fines was permissible Union conduct.

---

* The National Labor Relations Act provides a different statutory scheme from that of the Railway Labor Act, which has no provision comparable to §8(b)(1)(A) of the National Labor Relations Act. That section makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of the rights guaranteed in section 7 of the same statute. The NLRB case law which has developed as the Board has applied §8(b)(1)(A) to a variety of union conduct has turned on whether or not the union, in imposing discipline on its members, has violated that statutory section. The NLRB and the courts have attempted to harmonize the restrictions of §8(b)(1) with the proviso to the same section, i.e., that the restrictions contained therein shall not impair the right of the union to establish its own rules with respect to the acquisition or retention of membership.

The 8(b)(1)(A) cases evidence the kinds of conflict that have developed in the effort to balance Congressional concern with both the rights of individuals in their relations with their unions, and the underlying policy of avoiding impairment of the union as an institution.

Section 7 of the National Labor Relations Act provides that employees shall have the right to self-organization and to engage in concerted activities for the purpose of collective bargaining, or to refrain from any such activities. Employees' rights guaranteed under Section 7 are limited only to the extent that they may be affected by a union shop provision as authorized under the statute. Section 8(b) of the Act makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of rights guaranteed by Section 7. A proviso to Section 8(b) states that "This paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

The Court carefully examined the limitation on union discipline intended by Sections 7 and 8(b) of the Act and concluded that traditional, internal union discipline in general, and disciplinary fines in particular, were not prohibited by the statutory limits of Section 8(b).

The Court said:

> "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvement in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.
>
> Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed

> by a legislative body both to create and restrict the rights of those whom he represents. . . . *Steele* v. *L & N R. Co.*, 323 U. S. 192, 202" (at 180).

The essential point of the Court's analysis was its statement that "Integral to this federal labor policy has been the power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules and regulations governing membership" (at 181).

Having held that the power to levy fines and otherwise discipline members is an integral part of federal labor policy, the Court went on to hold that Court enforcement of fines was proper. It referred to the contract theory of union-member relationship and stated that:

> "The efficacy of a contract is precisely its legal enforceability. A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled . . . There may be concern that court enforcement may permit the collection of unreasonably large fines. However, even were there evidence that Congress shared this concern, this would not justify reading the Act also to bar enforcement of reasonable fines" (at 192, 193).

Following the Court's decision in *Allis-Chalmers,* it was presented with a related question—whether the imposition of fines upon Union members for violation of production ceilings established by the Union constituted "restraint" or "coercion" within the meaning of Section 8(b)(1). In *Scofield* v. *NLRB,* 394 U. S. 423 (1969) the Court reaffirmed the view of *Allis-Chalmers* that discipline to enforce a legitimate union interest did not contravene

any policy of the Act. Further cases, *NLRB* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, 409 U. S. 213 (1972), and *Booster Lodge No. 405, IAMAW, AFL-CIO* v. *NLRB*, 412 U. S. 84 (1973) held that the Union's power to impose discipline ended with a members resignation prior to engaging in the proscribed conduct, since the underlying contractual basis between the parties was removed. In *NLRB* v. *Boeing Co.*, 412 U. S. 67 (1973), the Court held that the reasonableness of an otherwise lawful fine was an internal matter, not affecting the individual's status as an employee, and beyond NLRB authority to regulate. The Court made clear that Section 8(b)(1)(A) was not intended to give the NLRB power to regulate internal union affairs, including the imposition of disciplinary fines with their consequent court enforcement against members who violated the Union's constitution and by-laws. It referred to its earlier examination of the legislative history of that section in *Allis-Chalmers* and reiterated that it was not intended to permit intrusion into the internal affairs of unions.

Thus, a review of the law developed since *Allis-Chalmers* leads to the inevitable conclusion that there is no statutory basis (even under the scheme of the National Labor Relations Act with the 8(b)(1)(A) provisions not present in the Railway Labor Act) for interference with the imposition of discipline for the enforcement of a legitimate union interest.

The Court of Appeals failed to comprehend that the Union's unquestioned legitimate interest in maintaining its very existence must include preserving the outward manifestations of solidarity in the face of the employer. If the union cannot do this, and members are allowed to openly support a rival union, then the national labor

policy sanctioning the "power in the chosen union to protect against erosion of its status" will have been severely debilitated.

Moreover, the Court of Appeals arrogated to itself a legislative function that is solely within the power of Congress; that is, to amend the Railway Labor Act to make union discipline for dual unionism unlawful. Congress has rejected far less drastic amendments, and thus to hold that such intention may be read into the statute is wholly unwarranted.

(B) The Decision of the Court of Appeals Conflicts With the National Labor Policy Clearly Mandating the Right of Unions, Under Title I of the LMRDA, to Establish and Enforce Rules to Protect Themselves as Institutions Without Judicial Interference.

The Court of Appeals, by denying the IAM the right to discipline members who sought to undermine its status as collective bargaining representative, misperceived the legislative intent of the proviso to the "free speech" provision of Title I of the Labor-Management Reporting and Disclosure Act [29 U. S. C. §411(a)(2)].

During Congressional debate prior to the enactment of the LMRDA, it became clear that even so valued a right as free speech had to be subject to limitation when it involved speech advocating undermining the Union and its cause (105 Cong. Rec. 6719-6726). Congress specifically reserved the rights to unions, therefore, to enforce rules as to the responsibility of a member toward the organization as an institution.

While such a broad proviso can be subject to judicial refinement, commentators on the newly enacted provisions of the LMRDA found no difficulty in concluding that dual

unionist conduct was intended to destroy the Union, and was the clearest possible violation of a member's responsibility toward the Union. In commenting upon the "free speech" provision of Title I and its proviso, Professor Archibald Cox stated:

> ". . . dissent in a Union, like treason in a Nation, must be suppressed if the purpose is to destroy the Union, encourage a rival, or bring about the violation of legal or contractual relations." Cox, Internal Affairs of Labor Unions, 58 Mich. L. Rev. 819 at 834-35 (1960).

The destructive nature of dual unionist conduct has been recognized by the federal courts. In *Sawyers* v. *Grand Lodge, IAM,* 279 F. Supp. 747 (ED Mo. 1967), a case which the Court below distinguished on the ground that expulsions rather than fines were involved, several members of an IAM local advocated disaffiliation with the IAM and affiliation with a rival union. The offending members were found guilty of espousing dual unionism and expelled. In upholding the Union's discipline, the Court in *Sawyers* held:

> "When local officers encourage local members to break away from the national organization and form an independent union, it clearly undermines the responsibility of local members to the national organization and threatens the enforcement of contractual obligations. Therefore, the advocation of dual unionism is not protected by Title I, LMRDA, or Section 7, NLRA" (at 756).

The Court of Appeals placed great reliance upon a Fifth Circuit case, *Airline Maintenance Lodge 702, IAM* v. *Loudermilk,* 444 F. 2d 719 (5th Cir. 1971), which denied the right of a Union to collect a fine from a member

engaged in dual unionism and who belonged to the union pursuant to a union shop provision. The court, in *Loudermilk*, justified reaching a decision contrary to the principles enunciated in *Allis-Chalmers* and *Scofield* by citing cases arising under the unfair labor practice sections of the National Labor Relations Act, which were clearly inapplicable. As stated previously, the Railway Labor Act makes no provision for unfair labor practices. Had Congress intended to impose unfair labor practices on unions covered by the Railway Labor Act, it could have done so; it did not. The Fifth Circuit also relied upon the decision in *Salzhandler* v. *Caputo*, 316 F. 2d 445 (2d Cir. 1963). *Salzhandler*, unlike *Loudermilk* and the case at bar, dealt with a member whose activities were confined to political criticism of officials of the union in the course of union meetings and not to dual unionism, espoused outside the union hall.

The Court of Appeals' reliance upon Title I of the IMRDA as a defense to a fine for advocating dual unionism is misplaced in light of the clear policy of Congress not to intrude too deeply into union internal affairs.

In adopting the LMRDA, the Senate recognized the following principles:

> "1. The Committee recognized the desirability of minimum interference by government in the internal affairs of any private organization. . . . Moreover, in establishing and enforcing statutory standards, great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.
>
> 2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully

competent to regulate union affairs. The Committee strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business. . . .'' (S. Rep. No. 187; 86 Cong. 1st Sess. 7 (1959)).

In *Boilermakers* v. *Hardeman*, 401 U. S. 233 (1971), *reh. den.* 402 U. S. 967 (1971), this Court, in reviewing standards of judicial intervention in relation to a union's authority to interpret its own regulations, recognized the union's right to determine the scope of offenses warranting discipline of its members. The federal courts had earlier held, as in *Hardeman*, that Title I was not a basis of judicial intervention in internal matters. See, e.g. *Gurton* v. *Arons*, 339 F. 2d 371 (2d Cir. 1964). The decision of the court below plainly conflicts with established precedent, frustrates the legislative intent of the LMRDA, and effectively amends federal labor law.

(C) The Decision of the Court of Appeals Effects a Departure From the Meaning of the "Freedom of Association" Provision of the Railway Labor Act.

The Railway Labor Act, under which the parties operated, was specifically amended in 1951 in order to permit union shop provisions to be written into collective bargaining agreements. Until 1951, the Act did not contain such provisions; the legislative history of the amendment makes clear that the omission of a union shop provision in the earlier sections of the statute was deliberate and for the purpose of avoiding the continued use of the device of company unions in the railway industry as a method of depriving employees of the right to bargain collectively. S. Rep. No. 2262, 81st Cong. 2d Sess. 3 (1950). Section 151(a) of the Act, which states that among the general

purposes of the Act is "to forbid any limitation upon freedom of association among employees or any denial as a condition of employment, or otherwise, of the right of employees to join a labor organization . . ." was part of the earlier text. The Union shop amendment expressly stated that it applied, "notwithstanding any other provisions of this chapter. . . ."

The entire history of the Railway Labor Act, and its application, of which the Court below failed to take cognizance, has been one of concern for avoidance of *employer* interference with such rights. There is nothing in the statute, nor in the case law, to suggest that a union member's right to organize in behalf of a rival union is protected by the "freedom of association" provision of the Railway Labor Act (45 U. S. C. § 151(a)).

(D) The Decision of the Court of Appeals Fails to Recognize the Effect of the Union Shop Provision Upon Union Membership Obligations.

While the Court of Appeals failed to deal explicitly with the effect of the union shop provision upon union membership obligations, except as it referred to *Loudermilk*, the decision cannot be read without reference to the fact that respondents were required to join the union in accordance with the Railway Labor Act.

The purpose of the union shop provision of the Railway Labor Act (45 U. S. C. § 152 (Eleventh) is to permit the union to maintain sufficient organizational integrity so as to fulfill its statutory responsibilities by requiring employees to share the costs of negotiating and administering collective agreements and the costs of the adjustment and settlement of disputes. *IAM* v. *Street*, 367 U. S. 740, 764 (1961). Arguments against the use of the union shop as a device for achieving such purposes have been

rejected by this Court, which noted that the coercive element of the union shop in requiring membership support of their unions had been found appropriate by Congress and thus was not the concern of the judiciary. *Railway Employees Dep't.* v. *Hanson* 351 U. S. 225, 234 (1956).

The compulsion of membership by a union security provision does not relieve the member of the obligations of union membership. The Court in *Allis-Chalmers* recognized this and stated:

> "But the relevant inquiry here is not what motivated a member's full membership [i.e. voluntary choice or a union security provision] but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member. . . . Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume to the contrary." (at 196).

If a union member does seek to limit his obligations to the union and retain employment, he may do so voluntarily by resigning and merely tendering the periodic dues required. The Court has previously held that membership as a condition of employment under a union security provision is "whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U. S. 734, 742 (1963).

The Court of Appeals, by placing great reliance upon *Loudermilk,* implicitly adopted a position sanctioning greater "protection" from union obligations for those who retain their membership and then claim, when it is convenient to do so, that they have done so "involuntarily." Such a posture is both unrealistic, by virtue of the prevalence of union security provisions, and dangerous, as it would inevitably prevent a union from main-

taining the stability and solidarity necessary to assure the objectives of the Act and to function in its role as statutory collective bargaining representative.

CONCLUSION

For all the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the New York State Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

OPINION

2 No. 318 73

CONSTANTINE BALLAS, as President of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Appellant,

vs.

MATTHEW McKIERNAN,

Respondent.

(And 2 other Actions)

JONES, J.:

We are asked to uphold the imposition of fines by a union against three of its members for activity described as dual unionism.

The three respondent union members were aircraft mechanics. Two were employed by National Airlines and the third was employed by Eastern Airlines. Each was required to maintain membership in the Union, Lodge 1894, International Association of Machinists and Aerospace Workers, AFL-CIO [IAM], pursuant to the union shop provision in the contracts with the airlines, the inclusion of which provision is expressly authorized by the Railway Labor Act, 45 U. S. C. § 152(11).

Appendix A

After periods of employment and membership in Lodge 1894 varying from four to fourteen years, each of the three respondents became an adherent of a rival union, Aircraft Mechanics Fraternal Association [AMFA]. In July, 1967 the three mechanics actively supported AMFA in an election in which AMFA sought to displace IAM as the bargaining representative of the aircraft mechanics employed by National Airlines. Lodge 1894 won the election, whereupon some of its members filed charges against the three respondents based on alleged violation of Section 3 of Article L of the IAM Constitution which provides in pertinent part:

> "The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or expulsion from membership * * *:
>
> "Attempting, inaugurating, or encouraging secession from the I. A. M. or advocating or encouraging or attempting to inaugurate any dual labor movement * * *."

No contention is made that the respondents did not violate the proscriptions of this constitutional provision.

Written notice of the specific charges were given each respondent and hearings were duly held before trial committees of Lodge 1894. The trial committees recommended that each of respondents be found guilty of violating the constitutional proscription of Section 3, and recommended fines as follows:—McKiernan, $1,000; Carroll, $3,000; Colon, $3,000. At a membership meeting a majority of the members found each respondent guilty. While the recommendation as to the fine against Colon was accepted,

the recommendations as to the fines against McKiernan and Carroll were rejected. On appeal, however, the International President reversed and accepted the recommendations as to the McKiernan and Carroll fines.

When the fines were not paid, appellant-plaintiff, as President of Lodge 1894, instituted the present proceeding for their collection. The New York City Civil Court for Queens County granted partial summary judgment for appellant as to the issue of liability, ordered that the issue of the reasonableness of the fines be left to the trial court as an issue of fact, and denied respondents-defendants' cross motions for summary judgment. On appeal the Appellate Term for the 2nd and 11th Judicial Districts, reversed and granted summary judgment for respondents-defendants. On further appeal the Appellate Division, Second Department, affirmed, but granted leave to appeal to our Court. We affirm the order of the Appellate Division, thus holding that this union could not impose fines on its members for dual unionism in the circumstances of this case.

The courts of our State generally have supported the enforcement of union discipline other than when to do so would operate to suppress criticism or political activity within the union. (See *The Law of Union Discipline: What the Courts Do In Fact*, 70 Yale L. J. 175; *Madden* v. *Atkins*, 4 N Y 2d 283 [holding expulsion of union members for internal political opposition illegal]). The issue now before us, of course, is whether on a proper balancing of the competing interests of the union and the interests of its individual members, a union proscription against dual unionism may be enforced by the imposition of fines against the offending members.

Appendix A

The Railway Labor Act lists as among its purposes:

> "To forbid any limitation upon freedom of association among employees," and "to provide for the complete independence * * * of employees in the matter of self organization to carry out the purposes of this Act * * *." (45 USC § 151a.)

It does not, however, contain any express parallel to Section 8(b)(1)(A) of the National Labor Relations Act which makes it an unfair labor practice for a union to "restrain or coerce employees in the exercise of the rights guaranteed in section 7"—the rights to self-organization and to engage in concerted activities for the purpose of collective bargaining. (29 U. S. C. § 158 [b] [1] [A].)

The Labor Management Reporting and Disclosure Act, applicable here, provides:

> "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions * * *: Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution * * *." [29 U. S. C. § 411(a)(2).]

We conclude that a rule which if enforced would preclude or deter the right of employees (who are members but not officers of the union) to seek by otherwise legitimate means to replace an incumbent bargaining agent with another collective representative is not reasonably required for the protection of the legitimate interests of

the incumbent union, and is accordingly violative of this provision of the Act. To say that the responsibilty of each union member is always and in all circumstances to support the current bargaining agent would be effectively to deny to the members the right of freedom of choice as to their bargaining representative. To sanction such a rule would be to impose a limitation upon the freedom of association among employees, in violation of the Railway Labor Act.

This is not an instance in which the activity of the union members is designed and calculated to advance the interests of the employer as against those of the union. In that situation the activity of the members can indeed be characterized as primarily destructive of the union. In such situations courts have upheld the right of the union to discipline the offending member (*Price* v. *NLRB*, 373 F 2d 443; *Tawas Tube Products*, 151 NLRB 46), although in the same situation the imposition of fines has been held impermissible (*NLRB* v. *IMAW Local 125* [*Blackhawk Tanning*], 442 F 2d 92). Nor is it an instance in which the union may legitimately fine its members for failure to support a duly adopted position of the union vis-a-vis the employer (*Scofield* v. *NLRB*, 394 U. S. 423 [violation of a production ceiling established by the union]; *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 [crossing picket lines established by the union in support of a lawful strike]) (Cf. *Florida Power & Light Co.* v. *I. B. E. W., Local 641*, —— U. S. —— [decided June 24, 1974]).

The present situation conceptually is more to be likened to the recognized right of union members to bring unfair labor practice charges against the union (Cf. *NLRB* v. *Marine Shipbuilding Workers*, 391 U. S. 418; *Charles S. Skura*, 148 NLRB 679). In that instance, as here, the

contested issue is between the rights of the individual members and the interests of the union. The rights and interests of the union as against third parties are only tangentially involved. This being so we hold that by constitutional provision the union may not in the guise of an asserted contractual restriction foreclose the individual members from the exercise of their legitimate right to freedom of choice of their bargaining agent. If the relationship between the union and its members be recognized as including in addition to contractual rights, substantial fiduciary obligations on the part of the union to its members (*Bradley* v. *O'Hare*, 11 A D 2d 15), the fiduciary may not advance its self-interest at the expense of the rights of the union members to whom its fiduciary responsibility runs.

In a case squarely in point, the United States Court of Appeals for the Fifth Circuit held that the imposition of a fine on a union member for joining and supporting another union was an invalid infringement on the rights of the union member under the provision of the Labor Management Reporting and Disclosure Act quoted above (29 U. S. C. § 411 [a] [2]) (*Lodge 702, IAM* v. *Loudermilk*, 444 F 2d 719). In that case an Eastern Airlines' pilot, a member of Lodge 702, IAM, pursuant to a union shop agreement, nonetheless became president of and worked for AMFA in an unsuccessful attempt to bring about the replacement of IAM as bargaining agent at National Airlines. Notwithstanding that the union member's conduct concededly violated the provisions of the IAM constitution, the court refused to enforce collection of the fine imposed by the union on the dissident pilot. We see no significant difference between the holding in *Loudermilk* and the determination at the Appellate Division in the present case. The holding in *Tri-Rivers Marine Engineers Union* (*U. S. Steel*), 189 NLRB 838,

is to the same effect.[1] (Cf. *Lodge 113, IAM* [*American Hospital Supply Corp.*], 207 NLRB, No. 127; *District Lodge No. 837, IAM* [*McDonnell Douglas Corp.*], 206 NLRB, No. 79.)

On principle we conclude that support of a rival union is a legitimate expression of member dissatisfaction with an incumbent collective representative, and involves the exercise of a right of the individual member which cannot be denied by the union irrespective of an explicit provision of the union constitution to the contrary.[2] On this view of the case we do not reach the other issues tendered by the parties.

The order of the Appellate Division should be affirmed.

* * *

Order affirmed, with costs. Opinion by Jones, J. All concur.

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[1] We are not unmindful of the decision in *Sawyers* v. *Grand Lodge, IAM*, 279 F. Supp. 747, in which the right of a union to *expel* an officer for dual unionism activities was upheld.

[2] We note, but hold to be without significance in the context of today's airport-wide bargaining where as here the election, while at a different airline, was at the same airport (LaGuardia), that the pilot in *Loudermilk* and one of the mechanics in the case now before us were engaged in activity in support of the rival union at an airline (National in both instances) other than that at which he was employed (Eastern, again in both instances). Nor does appellant make any point of this distinction. We also observe, but the record fails to disclose the significance if any of the fact, that the union membership voted not to accept the recommendations as to the imposition of fines on the two National Airlines mechanics but to accept the recommendation as to the fine against the Eastern mechanic.

Further we observe that while two of the mechanics here had at one time been officers of Lodge 1894, their service in such capacity had terminated well before the dual union activities here complained of. Accordingly we do not reach and imply no view, as to the right, if any, of the union to enforce discipline against its officer members for joining and promoting a rival labor organization.

APPENDIX B

Order Granting Leave to Appeal to the Court of Appeals

No. 2651

Constantine Ballas, as president of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO, appellant, v. Matthew McKiernan, resonent.

Constantine Ballas, as president, etc., appellant, v. John P. Carroll, respondent.

Constantine Ballas, as president, etc., appellant, v. Jose Antonio Colon, respondent.

Motion by appellant for leave to appeal to the Court of Appeals from an order of this court dated March 19, 1973, which unanimously affirmed an order of the Appellate Term, Second and Eleventh Judicial Districts, entered October 13, 1971.

Motion granted.

In our opinion, questions of law have arisen which ought to be reviewed by the Court of Appeals.

HOPKINS, Acting P. J., MUNDER, MARTUSCELLO, GULOTTA and BENJAMIN, JJ., concur.

Entered

May 1, 1973

Appendix B

Held in Kings County on May 1, 1973

HON. JAMES D. HOPKINS
Acting Presiding Justice

HON. FRED J. MUNDER
HON. M. HENRY MARTUSCELLO
HON. FRANK A. GULOTTA
HON. A. DAVID BENJAMIN
Associate Justices

CONSTANTINE BALLAS, as president of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Appellant,

v.

MATTHEW MCKIERNAN,

Respondent.

CONSTANTINE BALLAS, as president, etc.,

Appellant,

v.

JOHN P. CARROLL,

Respondent.

CONSTANTINE BALLAS, as president, etc.,

Appellant,

v.

JOSE ANTONIO COLON,

Respondent.

Appendix B

The above named Constantine Ballas, as president, etc., appellant, having moved for leave to appeal to the Court of Appeals from an order of this court dated March 19, 1973, which unanimously affirmed an order of the Appellate Term, Second and Eleventh Judicial Districts, entered October 13, 1971;

Now, upon the papers filed in support of and in opposition to said motion, and all the papers upon which the appeal was heard; and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof, it is:

ORDERED that the motion is hereby granted, the court being of the opinion that questions of law have arisen which ought to be reviewed by the Court of Appeals.

Enter:

S/ IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX C

Opinion and Order of the Appellate Division, Second Department

March 19, 1973

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

HOPKINS, Acting P.J., MUNDER, MARTUSCELLO, GULOTTA and BENJAMIN, JJ.

CONSTANTINE BALLAS, as President of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Appellant,

v.

MATTHEW McKIERNAN,

Respondent.

CONSTANTINE BALLAS, as President, etc.,

Appellant,

v.

JOHN P. CARROLL,

Respondent.

CONSTANTINE BALLAS, as President, etc.,

Appellant,

v.

JOSE ANTONIO COLON,

Respondent.

Appendix C

APPEAL (by permission) from an order of the Appellate Term for the Second and Eleventh Judicial Districts (WILLIAM B. GROAT, P.J., and CHARLES MARGETT and JOHN E. CONE, JJ.), entered October 13, 1971, which (1) reversed an order of the Civil Court of the City of New York, Queens County (SEYMOUR BOYERS, J.) dated August 27, 1970, (a) denying the joint motion for partial summary [sic] of the separate defendants in three actions, (b) granting plaintiff's cross motion for partial summary judgment and (c) directing that the issue as to reasonableness of the fines sought to be recovered by plaintiff in these actions be left for trial; and (2) granted defendants' said joint motion for partial summary judgment.

Vladeck, Elias, Vladeck & Lewis (Judith P. Vladeck of counsel), for appellant.

Surrey, Karasik, Morse & Seham (Martin C. Seham, Fred C. Klein & Susan A. Powers of counsel), for respondents.

MARTUSCELLO, J. The question on this appeal is whether fines imposed by a labor union on members pursuant to its constitution are judicially enforceable.

The plaintiff union commenced separate actions in the Civil Court of the City of New York, Queens County, to recover fines which it had levied by its own internal processes against three of its members, the defendants.

The defendants are aircraft mechanics. Two of them are employed by National Airlines and the other by Eastern Airlines. Each defendant became a member of the plaintiff union by virtue of a union shop provision in the particular collective bargaining agreement in force between the union and his employer when he took such

employment. The union shop provision applicable to defendants McKiernan and Carroll provided, as is authorized by the Railway Labor Act (U. S. Code, tit. 45, §152, subd. eleventh), that employees subject to its terms "shall, as a condition of their continued employment * * * become members of the Union within sixty (60) calendar employment days * * * and thereafter shall maintain membership in good standing in such Union." (The provision as to defendant Colon was essentially the same.)

All three defendants, though members of the plaintiff union, nevertheless became adherents of a rival union, Aircraft Mechanics Fraternal Association (AMFA). In July, 1967, they actively supported AMFA in an election in which AMFA sought to displace the plaintiff union as the bargaining representative of the aircraft mechanics employed by National Airlines.

The plaintiff union, however, won the election and thereafter some of its members filed charges against the defendants based on the defendants' activities in that election in favor of the rival union. After a trial they were found guilty of dual unionism and were fined sums ranging from $1,000 to $3,000. They refused to pay and thereupon the union instituted the actions to collect the fines imposed.

Following lengthy pretrial procedures, the defendants jointly moved for partial summary judgment and the union cross-moved for similar relief. The defendants' motion was denied. The union, however, was granted partial summary judgment, with the direction that the reasonableness of the fines be determined by the trial court as an issue of fact. In an opinion in support of its decision

(Ballas v. McKiernan, 63 Misc 2d 432), the court stated its findings on the issues raised to be as follows:

> (1) that the defendants were members of the union;
>
> (2) that the union's constitution and by-laws constituted a binding contract between the union and its members;
>
> (3) that the conduct for which the defendants were fined was not protected by the First Amendment to the Constitution of the United States; and
>
> (4) that the court had jurisdiction over the actions to collect the fines.

The defendants appealed to the Appellate Term and that court reversed and dismissed the complaints, with the following memorandum:

> "It was unlawful for plaintiff union to impose a fine upon defendant-members for their activities described as dual unionism (*Airline Maintenance Lodge 702, I.A.M.* v. *Loudermilk,* C. A. Fifth Cir., 444 F 2d 719)" (N. Y. Law Journal, Oct. 8, 1971, p. 20, col. 2).

A union's constitution and by-laws constitute a contract between the union and its members and define not only their relationship but also the privileges secured and the duties assumed by those who become members, unless contrary to public policy (*Fritsch* v. *Rarback,* 199 Misc. 356; *Lowe* v. *Feldman,* 11 Misc 2d 8, affd. 6 A D 2d 684). Here, the union's constitution defines improper conduct of members and sets forth those acts or omissions which constitute misconduct by a member and "which shall warrant a reprimand, fine, suspension and/or ex-

pulsion" (art. L, §3). Specifically described as such misconduct is the "advocating or encouraging * * * any dual labor movement * * * or * * * giving support to * * * organizations inimical to the I.A.M. [the plaintiff union] or its established policies and laws" (*id.*).

It cannot be disputed that the defendants' conduct violated the union constitution. The significant issue, however, is whether or not the union had the right to fine the defendants for engaging in activities described as "dual unionism."

Airline Maint. Lodge 702, I.A.M. & A.W. v. *Loudermilk* (444 F. 2d 719), cited by the Appellate Term in its decision, involved an appeal from an order of a Federal District Court dismissing a union's action to collect a fine imposed upon a union member pursuant to the union's constitution. The defendant Loudermilk was an employee of Eastern Airlines. He became a member of the plaintiff union on August 28, 1959, by virtue of a union shop agreement between the union and his employer, requiring him, as a condition of his employment, to become a member of the union within 60 days after the commencement of such employment. In 1963 he joined and became president of a rival union, Aircraft Mechanics Fraternal Association (AMFA). In August of 1967 he actively supported AMFA in an election where it sought to displace the plaintiff union as the bargaining representative of mechanics working for National Airlines. AMFA lost the election to the plaintiff union.

As a result of his election activities in favor of the rival union, Loudermilk was tried by the Trial Committee of plaintiff union and was found guilty of dual unionism. He was fined $500 and refused to pay. Thereafter the union filed an action in a local court to collect the fine

and Loudermilk had the action removed to the Federal District Court.

The District Court granted Loudermilk's motion for summary judgment, holding that although a validly imposed fine pursuant to a union constitution is judicially enforceable the fine involved was not validly imposed since the charge of dual unionism had arisen out of activities protected by the free speech provision of the Labor-Management Reporting and Disclosure Act of 1959 ([LMRDA], § 101, subd. [a], par. [2] [U. S. Code, tit. 29, § 411, subd. (a), par. (2); also known as the Landrum-Griffin Act]). That provision, so far as pertinent, is as follows:

> "Bills of rights; constitution and bylaws of labor organizations
>
> "(a) (1) * * *
>
> "(2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organizations his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings; *Provided,* that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere

with its performance of its legal or contractual obligations.

On appeal, the Court of Appeals, Fifth Circuit, affirmed. It held that it was clear from the terms of the above-quoted free speech provision of LMRDA that a union member has the right to free speech inside or outside of a union meeting, subject to the union's right to adopt and enforce reasonable rules as to the responsibility of every member toward the union as an institution. The court pointed out that *National Labor Rel. Bd.* v. *International & Allied W.U., Local No. 125* (442 F. 2d 92 [7th Cir.]) had upheld a National Labor Relations Board decision that the union defendant in that case had violated the unfair labor practice provision of the National Labor Relations Act in imposing a fine on a member for circulating a petition to decertify the union. There, the court held that the fine was not a defensive measure for the union's protection, as expulsion would be, but punishment to discourage the exercise of the right of access to the board.

The Court of Appeals, Fifth Circuit, in *Loudermilk* concluded with the following rationale (444 F. 2d 719, pp. 723-724, *supra*):

> "The rights of a union member under this statute must be balanced against the right preserved to the union to make rules as to the responsibility of the member toward the union as an institution, and this balancing process must rest on the facts. Loudermilk was compelled to join plaintiff union under the union shop agreement between Eastern and plaintiff IAM. Some years later he joined and became president of a rival union. He

was fined for supporting the rival union, albeit in connection with displacing IAM at another airline. IAM did not choose to expel him or bar him from meetings and the like, defensive actions which would have protected IAM. Rather, IAM sought to compel his allegiance by the imposition of a fine.

"We think this exceeded the authority of the union under the circumstances here which involve compulsory membership under a union shop agreement coupled with the free speech overtones which are inherent in undertaking [*sic*] stemming from dissatisfaction with one union and action seeking to displace that union with another. As the district court said with respect to this factor:

"'The Court has the responsibility of balancing the defendant's individual interest against that of the union. If the plaintiff could impose a judicially collectible fine upon a union member who had become satisfied [*sic*] with the union's representation and sought to replace it with a rival, it could effectively eliminate all criticism of its policies and foreclose any challenge of its right to represent its members. I believe that such a result would be inconsistent with the intent of Congress at the time it passed the Bill of Rights.' "

The plaintiff union here argues that pronouncements of the Supreme Court of the United States in cases involving union fines are dispositive of the issue as to the union's right to impose the fines in question and that *Loudermilk* (*supra*), relied upon by the Appellate Term, is an unappealed Federal Court of Appeals decision incompatible with such pronouncements and should not be followed.

Appendix C

In support of its argument the union cites *National Labor Rel. Bd.* v. *Allis-Chalmers Mfg. Co.* (388 U. S. 175). The issue there, as stated by the court in that case, was: "Whether a union which threatened and imposed fines, and brought suit for their collection, against members who crossed the union's picket line and went to work during an authorized strike against their employer, committed the unfair labor practice under section 8 (b) (1) (A) of the National Labor Relations Act of engaging in conduct 'to restrain or coerce' employees in the exercise of their right guaranteed by § 7 to 'refrain from' concerted activities" (p. 176). In that case it appeared that some members of a union which had called lawful economic strikes at two of the defendant's plants crossed the picket lines during the strikes. The union charged those members with violating its constitution and by-laws. After a trial the union fined the men various amounts. The defendant then filed unfair labor practice charges against the union. The Supreme Court held that the imposition of fines was within the power of the union. It noted that integral to the Federal labor policy of vesting unions with the power to order the relations of employees with their employer has been the power of the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. Emphasing that union disciplinary power is "particularly vital when the members engage in strikes," the court said, "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and 'the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent'" (p. 181).

Appendix C

In *Scofield* v. *National Labor Rel. Bd.* (394 U. S. 423), union members were fined and suspended by their union for violating a union rule relating to production ceilings. The employer then brought charges for unfair labor practices. The same basic issue that was raised in *Allis-Chalmers* (*supra*) was also raised in *Scofield.* There, too, it was held not to be an unfair labor practice to fine the members for violating the rule regarding production ceilings. The court noted that the law left a union free to enforce a properly adopted rule *which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws and is reasonably enforced against union members who are free to leave the union and escape the rule.*

The court noted that, as in *Allis-Chalmers,* the union members were subject to the discipline of an internal rule which strengthened the union's hand in bargaining and in this respect benefitted both the members who obeyed the rule and the non-members who did not [at bar the situation is obviously different, since it is a union shop and the defendants sought to organize and promote a different union].

Clearly, *Loudermilk* (*supra*) is squarely in point with the three cases at bar on the facts and should be followed unless it was erroneously decided.

The gist of the appellant's argument is that *Allis-Chalmers* and *Scofield* should control the cases at bar and that *Loudermilk* is incompatible with the holdings in these cases.

I disagree with the appellant. It is clear that there are two different situations and groupings of interest presented by the Supreme Court cases and the *Louder-*

milk case. Further, the statutes involved in those cases were different. In both *Allis-Chalmers* and *Scofield* the claims were that the unions had committed unfair labor practices in fining members for their activities. The unfair labor practices alleged were that the members in *Allis-Chalmers* were compelled to strike or at least honor the picket lines and that the members in *Scofield* were compelled to maintain and not exceed production quotas. In *Loudermilk,* on the other hand, the claim was that the defendant member had been *denied* the right of free speech and organization, which was set forth in the Labor-Management Reporting and Disclosure Act and was the policy of this country, as a result of the Union's attempt to fine him under its internal procedures.

With respect to the interests involved in the cases a similar difference exists. In *Allis-Chalmers* and *Scofield* the activities of the members in question were harmful to the unions in their relationship with the employers. In one case it hurt the lawful strikes and in the other it affected production. Thus, the unions had lawful interests to protect and *those interests also protected the interests of the unions' members as employees of the companies in question.* In *Loudermilk* and in the cases at bar however, the actions of the members in question did not directly affect the unions in their relations with the employers, *but rather affected the unions in their relations with their members and other unions.* Thus, while the interests of the workers and members as individual employees were not affected, the interests of the union as a viable institution were affected by the activities of Loudermilk. There is nothing to support a conclusion that Loudermilk's activity was detrimental to his coworkers.

Appendix C

In view of the fact that *Allis-Chalmers* and *Scofield* are factually different from *Loudermilk*, both as to the activities involved and the interests to be protected, I find that *Loudermilk* is not inconsistent with the Supreme Court cases. I agree with the reasoning in *Loudermilk*, as did the Appellate Term, and conclude that it should be followed. Accordingly, I hold that the fines involved were not validly imposed since the charge of dual unionism had arisen out of activities protected by the free speech provision of LMRDA.

The order of the Appellate Term should be affirmed, with $20 costs and disbursements to the respondents jointly.

HOPKINS, Acting P.J., MUNDER, GULOTTA and BENJAMIN, JJ., concur.

—— A D 2d ——

A—September 25, 1972

923 E. Constantine Ballas, as president of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO, appellant, v. Matthew McKiernan, respondent.

Constantine Ballas, as president, etc., appellant v. John P. Carroll, respondent.

Constantine Ballas, as president, etc., appellant, v. Jose Antonio Colon, respondent.

Order of the Appellate Term, Second and Eleventh Judicial Districts, entered October 13, 1971, affirmed, with $20 costs and disbursements to respondents jointly.

Opinion by MARTUSCELLO, J.

HOPKINS, Acting P.J., MUNDER, GULOTTA and BENJAMIN, JJ., concur.

APPENDIX D

Order Granting Leave to Appeal to the Appellate Division

No. 4270 Lv. App. from App. Term

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on January 12, 1972

HON. JAMES D. HOPKINS,
Acting Presiding Justice.

HON. FRED J. MUNDER,
HON. M. HENRY MARTUSCELLO,
HON. HENRY J. LATHAM,
HON. ARTHUR D. BRENNAN,
Associate Justices.

DECISION AND ORDER ON MOTION FOR LEAVE TO APPEAL TO THE APPELLATE DIVISION

CONSTANTINE BALLAS, as President, etc.,

Plaintiff,

v.

MATTHEW MCKIERNAN,

Defendant.

(and two other titles)

In the above-entitled cause, the above-named plaintiff, having moved in this Court for leave to appeal thereto

from an order of the Appellate Term of the Supreme Court, Second and Eleventh Judicial Districts, dated October 4, 1971;

Now, upon the papers filed in support of the motion and papers filed in opposition or in relation thereto; upon all the proceedings heretofore had herein; and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby granted.

Enter:

IRVING N. SELKIN,
Clerk of the Appellate Division

January 12, 1972 No. 4270

APPENDIX E

Decision and Order of the Appellate Term for the 2nd and 11th Districts

No. 97

CONSTANTINE BALLAS, as President of Lodge No. 1894, International Association of Machinists and Aerospace Workers, AFL-CIO, Respondent, v. MATTHEW McKIERNAN, Appellant.

CONSTANTINE BALLAS, as President, etc. Respondent, v. JOHN P. CARROLL, Appellant.

CONSTANTINE BALLAS, as President, etc., Respondent, v. JOSE ANTONIO COLON, Appellant.

Order and judgment in favor of plaintiff unanimously reversed, without costs, and defendants' motion for summary judgment in their favor dismissing the complaints granted.

It was unlawful for plaintiff union to impose a fine upon defendant-members for their activities described as dual unionism (*Airline Maintenance Lodge 702, IAM* v. *Loudermilk,* C. A., Fifth Cir., 444 F 2d 719).

Appendix E

At a Term of the Appellate Term of the Supreme Court of the State of New York for the 2nd and 11th Judicial Districts, held in Kings County, on the 4th day of October, 1971.

Cal. No. 97 Q

May 1971 Term

Present——

HON. WILLIAM B. GREAT,
Presiding Justice.

HON. CHARLES MARGOTT,
HON. JOHN E. CONE,
Justices.

CONSTANTINE BALLAS, as President of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Plaintiff-Respondent,

-v-

MATTHEW MCKIERNAN, JOHN P. CARROLL, ANTHONY COLON, a/k/a JOSE ANTHONY COLON, a/k/a TONY COLON,

Defendants-Appellants.

The above named Matthew McKiernan, et al., defendants in this action, having appealed to this Court from an

order and judgment of the Civil Court, City of New York; County of Queens entered on the 27th day of August, 1970 and the said appeal having been submitted by Mr. Martin C. Seham, of Counsel for the appellants, and submitted by Mr. [sic] Judith P. Vladeck, of Counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the order and judgment of the Civil Court, in favor of the plaintiff unanimously reversed, without costs and defendants' motion for summary judgment in their favor dismissing the complaints granted.

s/ William B. Great,
Presiding Justice, Appellate Term

APPENDIX F

Opinion and Order of the Civil Court, Queens County

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF QUEENS

Index #24086/68

CONSTANTINE BALLAS, as President of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Plaintiff,

against

MATTHEW McKIERNAN,

Defendant.

Index #18569/68

CONSTANTINE BALLAS, as President, etc.,

Plaintiff,

against

JOHN P. CARROLL,

Defendant.

Index #20789/68

CONSTANTINE BALLAS, as President, etc.,

Plaintiff,

against

JOSE ANTONIO COLON,

Defendant.

Appendix F

BOYERS, J.

These actions, consolidated solely for the purpose of the motion and cross motion for partial summary judgment herein essentially involve the claim of the plaintiff, Lodge 1894, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as the "Union") against three individual union members, Matthew McKiernan, John P. Carroll and Jose Antonio Colon (hereinafter referred to as "defendant-members") for the collection of fines. The Union alleges that in accordance with its constitution and by-laws, it conducted hearings before its union trial committees which determined that defendant-members had engaged in conduct inimical to the welfare of the Union. It is further alleged that such conduct was contrary to the provisions of the Union's constitution and by-laws thereby subjecting the defendant-members to "a reprimand, fine, suspension or expulsion." Fines were imposed in the amount of $3,000 as against two of the defendant-members and in the amount of $1,000 as against the third defendant-member which the defendant-members refused to pay.

Both the plaintiff Union and the defendant-members agree that the critical issues involved in this action are those of law, and are issues which should be determined by the Court in deciding the instant motions. The salient issues raised by the motions herein are (1) whether the defendants' membership in the plaintiff organization constituted a contractual relationship that would subject the defendant-members to the provisions of the Union's constitution and by-laws; (2) whether the defendant-members had constitutionally protected rights to promote and support a rival Union as the collective bargaining agent; (3)

whether a $3,000 or $1,000 fine is unreasonable and improper as a matter of law; and (4) whether the Civil Court of the City of New York has the jurisdiction to entertain plaintiff's action to enforce the collection of such fines.

The Union's charge, against each of the three defendants, was that while members of the plaintiff Union, they supported, in varying fashion, a rival union to supplant the plaintiff as collective bargaining representative of the employees employed by National Airlines. The Union claimed that this action by the defendant-members was designed to undermine and impair the effectiveness of the Union as the collective bargaining representative of all union members and others whom it was required, by law to represent or, at the very least had that effect.

The defendant-members contend that any "membership" that may have existed in the plaintiff union was pursuant to a compulsory union shop provision. It is the defendant's position, therefore, that such involuntary membership is not a sufficient contractual basis to support a claim that an individual has waived his constitutional privileges of free speech and his statutory rights of freedom of organization.

Contract in labor law is a term the implications of which must be determined from the connection in which it appears. (*J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332). The negotiations between union and management result in what often has been called a collective trade agreement, rather than a contract of employment. The employee becomes entitled by virtue of the National Labor Relations Act somewhat as a third-party

benficiary to all benefits of the collective trade agreement. The employee's relationship with the union is determined by the union's constitution and by-laws. The constitution and by-laws of an unincorporated association such as plaintiff Union constitutes a binding contract between the union and its member. (*Fritsch* v. *Rarbach,* 199 Misc. 356, 98 N. Y. S. 2d 748; *Lowe* v. *Feldman,* 11 Misc. 2d 8, 168 N. Y. S. 2d 674, affirmed 6 App. Div. 2d 684, 174 N. Y. S. 2d 949).

In plaintiff's memorandum in opposition to defendants' motion (pages 7 through 15) references are made to defendants' examination before trial, which are not rebutted in defendants' reply affidavit, showing that the fined employees involved herein enjoyed full union membership. Furthermore, the union shop provision requiring membership support of their unions has been found appropriate by Congress and thus was not the concern of the judiciary. (*Railway Employees* v. *Hanson,* 351 U. S. 225). The Court will not presume that the defendants enjoyed other than full union membership.

National labor policy extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; . . . The employee may disagree with many of the union decisions but is bound by them. 'The majority rule concept is today unquestionably at the center of our federal labor policy.' The complete satisfaction of all who are represented is hardly to be expected." (*National Labor Relations Board, Petitioner* v. *Allis-*

Chalmers Manufacturing Company et al, 388 U. S. 175, 180).

The Court is further exhorted by the defendant-members to outrightly reject plaintiff's action on the ground that to permit the union to collect the fines would abrogate a right paramount in our Constitution—that of freedom of expression under the First Amendment. But, as Justice Oliver Wendell Holmes aptly put it: "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." (*Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355).

Thus, the right to freely express the support of another union, sometimes called "dual unionism," is counterbalanced by the right of the union to protect itself from extinction. While it is essential to assure democratic conduct of union affairs and to protect the individual member's rights to free expression, at some point, there must be a balancing of the individual's rights against the good of the group. This is particularly so where the individual's conduct could have the effect of destroying the union to the detriment of its membership. The Court finds this conduct to be decidedly different from the expression of dissatisfaction with the leadership of the union and the exertion of efforts within the framework of the Union to unseat the leadership. In the latter case, the activity within the union to change the leadership is and should be protected conduct, whereas, the support and encouragement of a rival organization is a breach of duty and obligation to the membership of the union and

should not receive protection of the law. To hold otherwise would threaten the stability of the labor movement.

In *National Labor Relations Board* v. *Allis-Chalmer Manufacturing Co., supra,* Mr. Justice Brennan speaking for the majority of the Court in effect stated that the union has the right to prescribe its own rule respecting aquisition or retention of membership, to impose fines, and to bring suit for their collection against members who violate the provisions of the union's constitution and by-laws. The imposition of a fine and the court enforcement of same is within the ambit of internal union affairs and is a necessary consequence of the "contract theory" of the union member relationship provided that the fine is reasonable.

As to the reasonableness of the fine, the Court will leave that determination to a trial court or jury as an issue of fact.

Allis-Chalmers, supra, held that uncollected fines could be recovered by suit in a civil court. This case provides cogent support on the issue of jurisdiction by the Civil Court of the City of New York to entertain the present action herein.

Settle order on Notice.

Dated: May 16, 1970

s/ SEYMOUR BOYERS,
J. C. C.

Appendix F

ORDER AND JUDGMENT OF THE CIVIL COURT, QUEENS COUNTY

At a Special Term, Part I of the Civil Court of the City of New York, held in and for the County of Queens, at the Courthouse, 88-11 Sutphin Boulevard, in the County of Queens, City and State of New York, on the 27th day of August, 1970.

Present:

HON. SEYMOUR BOYER,
Justice.

Cal. No. A1644/69
Index No. 18569/68

CONSTANTINE BALLAS, as President of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Plaintiff,

against

JOHN P. CARROLL,

Defendant.

Cal. No. A1646/69
Index No. 20789/68

CONSTANTINE BALLAS, as President of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Plaintiff,

against

ANTHONY COLON, a/k/a JOSE ANTHONY COLON, a/k/a TONY COLON,

Defendant.

Appendix F

Cal. No. A1646/69

Index No. 24086/68

CONSTANTINE BALLAS, as President of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Plaintiff,

against

MATTHEW MCKIERNAN,

Defendant.

Defendants in each of the above captioned actions having jointly moved for partial summary judgment, and the said actions having been consolidated for the purpose of defendants' motion, and plaintiff in each action having cross-moved for partial summary judgment, and the motions having duly come on to be heard on the 17th day of March, 1970.

Now, upon reading the pleadings heretofore filed herein and upon reading and filing the defendants' notice of motion dated the 10th day of December, 1969, the affidavit of Martin C. Seham, Esq., sworn to the 9th day of December, 1969, and the exhibits thereto attached, in support of said motion and in opposition to plaintiff's cross-motion, and the cross-motion of plaintiff dated the 27th day of February, 1970, and the affidavit of Judith P. Vladeck, sworn to the 27th day of February, 1970, in support of said cross-motion and in opposition to defendants' motion, and upon reading and filing the depositions of defendants John

P. Carroll, Anthony Colon, and Matthew McKiernan, sworn to by each of said defendants the 27th day of November, 1968 and the 6th day of February, 1969, and the deposition of plaintiff, Constantine Ballas, sworn to the 8th day of January, 1969, and after hearing Surrey, Karasik, Greene and Seham, Esqs., attorneys for defendants, by Martin C. Seham, Esq., of Counsel, in support of defendants' motion and in opposition to plaintiff's cross-motion, and Vladeck, Elias, Vladeck & Lewis, attorneys for plaintiff, by Judith P. Vladeck, of Counsel, in opposition to defendants' motion and in support of plaintiff's cross-motion, and due deliberation having been had thereon, and upon reading and filing the opinion of the Court, it is, upon motion of Vladeck, Elias, Vladeck & Lewis, attorneys for plaintiff,

ORDERED, that the defendants' motion for partial summary judgment be and the same hereby is denied; and it is further

ORDERED, that the plaintiff's motion for partial summary judgment be and the same hereby is granted; and it is further

ORDERED, that the issue as to the reasonableness of the fines be left to the trial court as an issue of fact.

Enter

S/ SEYMOUR BOYER
J. C. C.

APPENDIX G

Answers of Respondents [Raising Federal Questions]

ANSWER AND COUNTERCLAIM

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF QUEENS

CONSTANTINE BALLAS, as President of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Plaintiff,

against

MATTHEW MCKIERNAN,

Defendant.

Defendant, by his attorneys, Kopple & Seham, for his answer to the complaint herein, states:

GENERAL DENIAL

1. First Affirmative Defense: Action is contrary to the purpose and provisions of the Federal Railway Labor Act, 45 U. S. C. §151, et seq.

2. Second Affirmative Defense: Action is contrary to the public policy of the State of New York, including New York State Constitution, Article I, Section 17.

3. Third Affirmative Defense: Fines were imposed in a manner contrary to the procedures established by the Plaintiff's Constitution and By-Laws.

4. Fourth Affirmative Defense: The contract upon which the action is allegedly based was entered into involuntarily and under duress.

5. Fifth Affirmative Defense: The procedures by which the fines in question were imposed violated the defendant's right to due process guaranteed by the Federal and State Constitutions.

6. Sixth Affirmative Defense: The procedures by which the fines were imposed violated the provisions of the Landrum-Griffin Act, 29 U. S. C. §411.

As and for Defendant's Counterclaim to the Complaint Herein:

7. Plaintiff deliberately, intentionally and maliciously deprived the defendant of his rights to self-organization guaranteed by the New York Constitution and the Railway Labor Act and did similarly deprive him of the procedural protections of the Landrum-Griffin Act, to his damage in the amount of $2,000.00, punitive damages being demanded in the amount of $8,000 and injunctive relief being demanded against the continuance of the plaintiff's acts.

WHEREFORE, defendant demands judgment dismissing the complaint, together with the costs and disbursements of the action, and that judgment be entered in his favor in the amount of $2,000.00 compensatory damages, plus $8,000.00 punitive damages, and that an injunction issue against the further acts of the plaintiff in depriving the defendant of rights guaranteed to him under State and Federal Law.

Dated: August 14, 1968.

KOPPLE & SEHAM
Attorneys for Defendant
205 West 34th Street
New York, New York 10001
LO-5-4424

Appendix G

To:

VLADECK, ELIAS, FRANKLE, VLADECK & LEWIS
Attorneys for Plaintiff
165 West 46th Street
New York, New York 10036

ANSWER AND COUNTERCLAIM

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF QUEENS

Index No. 18567/68

CONSTANTINE BALLAS, as President of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Plaintiff,

against

JOHN P. CARROLL,

Defendant.

Defendant, by his attorneys, Kopple & Seham, for his answer to the complaint herein, states:

GENERAL DENIAL

1. First Affirmative Defense: Action is contrary to the purpose and provisions of the Federal Railway Labor Act, 45 U. S. C. §151, et seq.

2. Second Affirmative Defense: Action is contrary to the public policy of the State of New York, including New York State Constitution, Article I, Section 17.

3. Third Affirmative Defense: Fines were imposed in a manner contrary to the procedures established by the plaintiff's Constitution and By-Laws.

4. Fourth Affirmative Defense: The contract upon which the action is allegedly based was entered into involuntarily and under duress.

5. Fifth Affirmtive Defense: The procedures by which the fines in question were imposed violated the defendant's right to due process guaranteed by the Federal and State Constitutions.

6. Sixth Affirmative Defense: The procedures by which the fines were imposed violated the provisions of the Landrum-Griffin Act, 29 U. S. C. §411.

As and for Defendant's Counterclaim to the Complaint Herein:

7. Plaintiff deliberately, intentionally and maliciously deprived the defendant of his rights to self-organization guaranteed by the New York Constitution and the Railway Labor Act and did similarly deprive him of the procedural protections of the Landrum-Griffin Act, to his damage in the amount of $2,000.00, punitive damages being demanded in the amount of $8,000.00 and injunctive relief being demanded against the continuance of the plaintiff's acts.

WHEREFORE, defendant demands judgment dismissing the complaint, together with the costs and disbursements of the action, and that judgment be entered in his favor in the amount of $2,000.00 compensatory damages, plus $8,000.00

punitive damages, and that an injunction issue against the further acts of the plaintiff in depriving the defendant of rights guaranteed to him under State and Federal law.

Dated: June 28, 1968

KOPPLE & SEHAM
Attorneys for Defendant
205 West 34th Street
New York, New York 10001
LO 5-4424

To:

VLADECK, ELIAS, FRANKLE, VLADECK & LEWIS
Attorneys for Plaintiff
165 West 46th Street
New York, New York 10036

ANSWER AND COUNTERCLAIM

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF QUEENS

Index No. 20789/68

CONSTANTINE BALLAS, as President of Lodge No. 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Plaintiff,

against

ANTHONY COLON, a/k/a Jose Anthony Colon, a/k/a Tony Colon,

Defendant.

Appendix G

Defendant, by his attorneys, Kopple & Seham, for his answer to the complaint herein, states:

GENERAL DENIAL

1. First Affirmative Defense: Action is contrary to the purpose and provisions of the Federal Railway Labor Act, 45 U. S. C. §151, et seq.

2. Second Affirmative Defense: Action is contrary to the public policy of the State of New York, including New York State Constitution, Article I, Section 17.

3. Third Affirmative Defense: Fines were imposed in a manner contrary to the procedures established by the Plaintiff's Constitution and By-Laws.

4. Fourth Affirmative Defense: The contract upon which the action is allegedly based was entered into involuntarily and under duress.

5. Fifth Affirmative Defense: The procedures by which the fines in question were imposed violated the defendant's right to due process guaranteed by the Federal and State Constitutions.

6. Sixth Affirmative Defense: The procedures by which the fines were imposed violated the provisions of the Landrum-Griffin Act, 29 U. S. C. §411.

As and for Defendant's Counterclaim to the Complaint Herein:

7. Plaintiff deliberately, intentionally and maliciously deprived the defendant of his rights to self-organization

guaranteed by the New York Constitution and the Railway Labor Act and did similarly deprive him of the procedural protections of the Landrum-Griffin Act, to his damage in the amount of $2,000.00, punitive damages being demanded in the amount of $8,000.00 and injunctive relief being demanded against the continuance of the plaintiff's acts.

WHEREFORE, defendant demands judgment dismissing the complaint, together with the costs and disbursements of the action, and that judgment be entered in his favor in the amount of $2,000.00 compensatory damages, plus $8,000.00 punitive damages, and that an injunction issue against the further acts of the plaintiff in depriving the defendant of rights guaranteed to him under State and Federal law.

Dated: June 21, 1968

KOPPLE & SEHAM
Attorneys for Defendant
205 West 34th Street
New York, New York 10001
LO 5-4424

To:

VLADECK, ELIAS, FRANKLE, VLADECK & LEWIS
Attorneys for Plaintiff
165 West 46th Street
New York, New York 10036

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-400

CONSTANTINE BALLAS, as President of Lodge 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Petitioner,

vs.

MATTHEW McKIERNAN, JOHN P. CARROLL, and JOSE ANTONIO COLON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

MARTIN C. SEHAM
ANDREW E. ZELMAN
Attorneys for Respondents
500 Fifth Avenue
New York, New York 10036

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-400

CONSTANTINE BALLAS, as President of Lodge 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Petitioner,

vs.

MATTHEW MCKIERNAN, JOHN P. CARROLL, and JOSE ANTONIO COLON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Question Presented for Review

Is an individual's right to advocate a change in collective bargaining representative and to participate openly in the procedures for such change protected by the Railway Labor Act and the Freedom of Speech provisions of the Labor Management Reporting and Disclosure Act, against punitive fines by the incumbent union of which he is a member pursuant to contractual union shop provisions?

Statement of the Case

It is agreed that the three individual Respondent aircraft mechanics engaged in an effort to displace the Petitioner, International Association of Machinists (IAM), as the bargaining representative. Their activities were open and public, consisting of discussion, advocacy and the circulation of printed material. An election was called by the National Mediation Board in accordance with the procedures of the Railway Labor Act. During the pendency of the election campaign the three mechanics continued their open support of the rival union (Aircraft Mechanics Fraternal Association—AMFA) and one of the three was designated as a "poll-watcher" or "runner" for AMFA by the NMB. The three men were fined a total of $7,000 ($3,000-$3,000-$1,000) for *these activities* on the grounds that they constituted "dual unionism" within the meaning of the IAM Constitution.*

At the time of the events described above and in the petition, the individuals were employed by an carriers under contract with the IAM. Those contracts contained union shop provisions which required IAM membership as a condition of continued employment.

---

* Section 3 of Article L of the IAM Constitution provides in pertinent part:

> "The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or expulsion from membership * * *.
>
> "Attempting, inaugurating or encouraging succession from the IAM or advocating or encouraging or attempting to inaugurate any dual labor movement * * *."

It is undisputed that Respondents understood or were given to understand that they must join the IAM or lose their jobs. No affirmative action was taken by either the union or the Employer to advise Employees that any alternative course was available. There was no provision in the union constitution or by-laws indicating how an individual might resign and preserve his job. In short, Respondents understood that so long as the IAM was their designated union, they were required to be members in order to continue their employment.

On charges brought by "plaintiffs" who were, themselves, union officials, "trial" proceedings were conducted within the union, resulting in fines totalling $7,000. The union members, in the case of McKiernan and Carroll, voted to affirm the conviction and then voted to suspend the fines. Thereafter, in violation of the union's constitution,* the union officials, including international representatives, lectured the membership, and they voted to affirm Color's guilt and the imposition of a fine. The decision of the union members to suspend the fines was appealed by the union to its own International President *without notice* to the Respondents. It was an *ex parte* proceeding relying upon a transcript of the union's hearing which Petitioner knew that Respondents did not have.

---

* Article L, Section 12(1) states in pertinent part:

"After the trial committee has made the necessary explanation of its intent and meaning, the trial committee's verdict with respect to guilt or innocence of the defendant shall be made without debate to a vote by secret ballot of the members of the LL (Local Lodge) in attendance."

While these and other due process points are not before the Court on this Petition since they were not reached by the Court below, the Petitioner's Statement of the Case should not be permitted to convey the impression that we are dealing with anything but the attempt of a massive international union to crush dissent by *all* means available to it—including the prolongation of this very litigation.

POINT I

This Court should deny the Petition for Certiorari, as the decision of the Court of Appeals is consistent with established national labor policy as embodied in the decisions of the Supreme Court.

The New York Court of Appeals relied on Federal statutory policy to set aside the punitive fines levied against the individual Respondents. The Court held:

> "* * * that by constitutional provision the union may not in the guise of an asserted contractual restriction foreclose the individual members from the exercise of their legitimate right to freedom of choice of their bargaining agent. If the relationship between the union and its members be recognized as including in addition to contractual rights, substantial fiduciary obligations on the part of the union to its members (Bradley v. O'Hare, 11 A.D. 2d 15), the fiduciary may not advance its self-interest at the expense of the rights of the union members to whom its fiduciary responsibility runs." *Ballas* v. *McKiernan,* 35 N.Y. 2d 14, 20 (1974).

A line of distinction has emerged from the decisions of this Court, the National Labor Relations Board and other

Federal Courts, which emphasizes the distinction between an individual's obligations to subordinate his personal views in favor of the collective strength of the bargaining agent *vis-a-vis management* and an individual's continuing right to control the choice of his bargaining agent and to utilize statutory procedures designed for his own personal protection.

In *NLRB* v. *Allis-Chalmers*, 388 U.S. 175 (1967), this Court (four Justices dissenting, one concurring) relied upon the proviso to Section 8(b)(1)(A) of the National Labor Relations Act* in reaching its decision that a suit to collect a union fine against members who cross a picket line during a strike was not an unfair labor practice by the union. The Court recognized that the power of a union to discipline its members is "particularly vital when the members engage in strikes." 388 U.S. at 181. This case did not suggest a direct legitimization of disciplinary fines, but, on the contrary, stated that the seriousness of strike-

* National Labor Relations Act, 29 U.S.C. §158(b)(1)(A) (1964). The specific language of Section 8(b)(1)(A) states:

> "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title."

National Labor Relations Act, 29 U.S.C. §157 (1964) provides:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title."

breaking was such as to nullify the union's principal weapon and destroy the economic objective for which the union exists. Thus, the Court permitted the fines while acknowledging the individual's rights under Section 7 of the National Labor Relations Act* to refrain from collective economic action. Similarly, in *Scofield* v. *NLRB,* 394 U.S. 423 (1969), the union had adopted a rule setting certain production ceilings and the Court considered whether it was an unfair labor practice for the union to penalize an individual who had exceeded those standards. As in *Allis-Chalmers,* the Court held that this was protected by the union's right to control its internal affairs. It should, however, be noted that the NLRB has limited *Scofield* to those situations where the union has bargained for the production ceiling. *New York District Council No. 9, International Brotherhood of Painters and Allied Trades* v. *NLRB,* 453 F.2d 783 (2d Cir. 1971).

In both *Scofield* and *Allis-Chalmers* the union's objective was tied to the establishment or protection of working conditions for the represented group. However, neither case raised an issue of the individual employee's right to protection against invidious action directed against him by the union, nor was there an issue affecting the member's right to change his representative.

In *NLRB* v. *Marine Shipbuilding Workers,* 391 U.S. 418 (1968), the Court confirmed the distinction made in *Allis-Chalmers* and *Scofield* between those rights which are superior to membership obligations, and those which must be surrendered in the interest of the collective strength of

* See footnote on page 5 of text.

the unionized group. In this case, the Court overturned the union's attempt to discipline a member for filing an unfair labor practice charge against it. The Court clearly stated that an individual, regardless of his membership status, was not to be deprived of those protections afforded him by Congress. The Circuit Courts and the NLRB have uniformly followed the *Marine Shipbuilding* rationale by protecting individuals against union fines for utilization of those statutory procedures relating to choice of representative. In *American Hospital Supply Corp.*, 207 N.L.R.B. No. 127, 84 LRRM 1601 (1973), the Board held, 84 LRRM at 1604:

> "Realistically, both deauthorization and decertification petition[s] represent serious threats to a union. The decertification petition if successful eliminates the union as the collective bargaining representative. The deauthorization petition if successful does not relieve the incumbent Union from its obligation to act as collective bargaining agent, but, it allows employees to work in the appropriate unit without joining the union or paying dues. Thus, the deauthorization petition can deprive the union of necessary income to administer properly the contract while at the same time the union still has its legal obligation to represent all of the employees in the unit. We therefore see no reason to depart from the rationale of *Blackhawk Tanning, supra*, and its progeny in a deauthorization situation. Accordingly, *we conclude that Respondent Union violated Section 8(b)(1)(A) of the Act for fining Vincent for his deauthorization activities because the effect is not defensive and can only be punitive-to discourage members from seeking access to the Board's processes.*" (Emphasis added.)

For other cases in which fines have been held illegal, see *e.g., Teamsters Local 165 (Goodyear Tire & Rubber Co.)*,

211 N.L.R.B. No. 100 (1974) (Fine for sponsoring and participating in deauthorization election); *Boot & Shoe Workers (United States Shoe Corp.)*, 208 N.L.R.B. No. 64 (1974) (Fine for soliciting fellow employees to sign rival authorization cards); *Electrical Workers, IBEW, Local 34 (Protection Alarms, Inc.)*, 208 N.L.R.B. No. 91 (1974) (Fine for filing unfair labor practice charge); *District Lodge No. 837, IAM (McDonnell Douglas Corporation)*, 206 N.L.R.B. No. 79 (1973) (Fine for soliciting signatures on rival union cards); *Lodge 113, IAM (American Hospital Supply Corp.)*, 207 N.L.R.B. No. 127 (1973) (Fine for activities in support of union-shop deauthorization petition); *Textile Workers Union of America (Visnet Mill, Bemis Co., Inc.)*, 189 N.L.R.B. 598 (1971) (Fine for soliciting other employees to sign rival union authorization cards); *Lodge 66, IAM (Smith-Lee Co.)*, 182 N.L.R.B. 849 (1970) (Fine for circulating decertification petition).

The decisional developments in the law have not left this union with its hundreds of thousands of members defenseless in protecting its monolith. The *Sawyers* case* cited by the Petitioner demonstrates precisely the accommodation which has been made between union solidarity and individual freedom. There the Court held that an employee whose actions are inconsistent with the union's policies can be expelled—eliminated from the body politic under appropriate circumstances. Thus, the union may preserve its own integrity.**

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* *Sawyers* v. *Grand Lodge International Association of Machinists*, 279 F.Supp. 747 (E.D. Mo. 1967).

** *Tawas Tube Products, Inc. and Harold Lohr and U. S. Steelworkers*, 151 N.L.R.B. 46 (1965); *NLRB* v. *International Molders and Allied Workers Union, Local 125 (Blackhawk Tanning Co., Inc.)*, 178 N.L.R.B. 208, enforced 442 F.2d 92 (7th Cir. 1971); *Richard Price* v. *NLRB*, 373 F.2d 443 (9th Cir. 1967), cert. den., 392 U.S. 904.

Consider the effect upon the statutory guarantees of free association and the procedures for promoting it of the $7,000* in fines in this case. The calculated effect was to prevent *any* challenge to the union's position and thereby to *nullify* those procedures. The suggestion by the union that its statutory permission for a union shop contract swallows up the employee's right to change his representative is the same argument that was made and rejected in *Marine Shipbuilding* in reliance upon the union shop and 8(b)(1)(B) proviso in the NLRA. The argument comes with particular ill grace from the union which in this case is relying on a contract clause and a constitution which actively misled the covered employees as to their right to limit their membership.

Petitioner has also misperceived both the relevance and applicability of the NLRA with respect to this case. While it is true that the Railway Labor Act is different from the NLRA in enforcement procedures, both statutes clearly guarantee employee rights of self-determination. Specifically, the NLRA, Section 8(b)(1)(A) makes it an unfair labor practice "to restrain or coerce Employees in the exercise of their Section 7 rights of self-determination." The Railway Labor Act's General Purposes, Sec. 2 states:

> "The purposes of the Act are * * * (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization."**

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* Note the fines were levied in 1968 at a higher valued dollar.

** U. S. Code, 45 U.S.C. Section 152.

The amendment to the Act, which permitted the union shop agreement, §152, subd. eleventh (c) states in pertinent part:

> "The requirement of membership in a labor organization (a) * * * shall be satisfied * * * if said employee shall hold or acquire membership in any one of the labor organizations national in scope, organized in accordance with this Act * * *
>
> * * *
>
> "*Provided, further* that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another * * *."

The effect of permitting the coercive union fines levied in this case would not only be contrary to organizational rights under Section 2 of the Railway Labor Act but would also nullify the proviso to the union shop provision which the union itself relies upon.

Time and again, the Courts have given great weight to NLRA cases dealing with situations parallel to the one at issue under the Railway Labor Act. As the Court stated in *Pan American Airways* v. *International Brotherhood of Teamsters*, 275 F.Supp. 986, 997-98 (S.D.N.Y. 1967), aff'd 404 F.2d 938 (2nd Cir. 1969):

> "[Cases under the Railway Labor Act] offer a cogent analogy in the solution of similar problems arising under the Railway Labor Act and the courts have frequently drawn on NLRA cases for guidance. See *e.g., Ruby* v. *American Airlines, Inc.*, 323 F.2d 248 (2nd Cir. 1963), cert. den. 376 U.S. 913, 84 S.Ct. 658 (1964); *Flight Engineers' International Ass'n* v. *Eastern Airlines, Inc.*, 208 F.Supp. 182 (S.D.N.Y. 1962); *American*

Airlines, Inc. v. *Air Line Pilots Ass'n, Int'l*, 169 F. Supp. 777 (S.D.N.Y. 1958)."*

The pertinence of these NLRA cases is illustrated by the decisions interpreting and applying the doctrine of a union's duty of fair representation. That doctrine—which requires that unions treat the employees which they represent fairly and without hostile discrimination—was first articulated in cases arising under the Railway Labor Act See, generally, *Steele* v. *Louisville and Nashville Railroad Company*, 323 U.S. 192 (1944); *Oliphant* v. *Brotherhood of Locomotive Firemen and Enginemen*, 262 F. 2d 359 (6th Cir. 1958); and it has since been applied in full in many cases arising under the National Labor Relations Act. See, *e.g.*, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1955); *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Humphrey* v. *Moore*, 375 U.S. 334 (1964). Thus, in the area of the law that the instant case involves—namely, protection of the rights of individual union members—the cases under the NLRA, draw their very decisional basis from the RLA.

POINT II

The Court of Appeals properly relied on the *Loudermilk* case.

The New York Court of Appeals followed established Federal law** in holding that the fines sought by the union were unenforceable because they violated the freedom

* See, also, *Carpenters Local 22 (Graziano Construction Company)*, 195 N.L.R.B. 5 (1972) in which the Board referred to the LMRDA in striking down a fine, relying on *Scofield's* mandate to the Board to consider the full panoply of congressional labor policies in determining the legality of union fine.

** *Airline Maintenance Lodge 702, IAM* v. *Loudermilk*, 444 F.2d 719 (5th Cir. 1971).

of speech provisions under Section 101(a)(2) of the Labor Management Reporting and Disclosure Act (Landrum-Griffin Act), 29 U.S.C. Section 411(a)(2). That section of the "Bill of Rights" of members of labor organizations provides for freedom of speech and assembly to *all* members of labor organizations. Under this provision, union members are free to express "any views, arguments or opinions." This expression is subject to two limitations: the right to enforce reasonable rules as to the responsibility of members toward the organization as an institution; and the right to enforce reasonable rules requiring members to refrain from conduct that would interfere with the union's performance of its legal or contractual obligations.

The facts of the *Loudermilk* case are virtually identical to those at bar, even to the fact that the IAM was the incumbent union seeking to forestall a change of representation to AMFA among a group of air line employees. In *Loudermilk* the Fifth Circuit found that the Respondent's "dual unionist" activities of seeking a change in representation through statutory procedures were protected free speech under the "Bill of Rights" when balanced against the union's right to make "reasonable rules," where he had been compelled to join the union under a union shop agreement. For reasons best known to itself, the IAM did not seek review of the Fifth Circuit's decision. That decision then became the established law on this issue and has now been followed by three successive appellate decisions in the Courts of New York.

In its decision on this case, the New York Court of Appeals specifically recognized the correctness of the *Louder-*

milk holding that "the imposition of a fine on a union member for joining and supporting another union was an invalid infringement on the rights of the union member under the provision of the Labor Management Reporting and Disclosure Act." 35 N.Y. 2d 14, 21. The Court then went on to formulate its conclusion based on this principle and stated that "support of a rival union is a legitimate expression of member dissatisfaction with an incumbent collective representative, and involves the exercise of a right of the individual member which cannot be denied by the union * * *." 35 N.Y.2d 14, 21.

Appellant argues at length that Title I of the LMRDA, known as the "Bill of Rights," guarantees members freedom of speech only *within* the confines of the organization and its rules. On the contrary, free speech is guaranteed inside or outside a union meeting subject to the union's right to adopt and enforce *reasonable* rules as to the responsibility of every member toward the union as an institution.* The key question of course is what constitutes a "reasonable" rule when the preferred right of freedom of speech and association, guaranteed by the Federal and State Constitutions as well as the Landrum-Griffin Act, is at stake. Petitioner cites a number of cases in which courts have upheld union rules *none* of which involved an employee's right to choose his own bargaining representative. Petitioner also stresses the fact that an individual has no right to insist upon change when it is contrary to the will of the majority. But as the Fifth Circuit in

* It should be pointed out that every case Petitioner cites in support of its argument against union democracy within the union *antedates* the passage of the Landrum-Griffin Act in 1959 (Petitioner's Brief at 13-16).

Loudermilk and the New York Court of Appeals in this case both pointed out, where membership is involuntary there can no longer be any question of majority will. Furthermore, there are no cases which hold that this kind of right of access to Board processes by an individual can ever be waived by the vote of a presumed majority of union members.

The Fifth Circuit's opinion, quoted with approval by the New York Court of Appeals, represents a careful balancing of interests in determining what is a reasonable rule in a factual situation identical to Respondent's. The Court's opinion concluded that *Loudermilk's "dual unionist"* activities were protected free speech when balanced against the union's right to make "reasonable rules" where he had been compelled to join the union under a union shop agreement. Union shop provisions are, as a practical matter, by their very nature sufficiently coercive to preclude a finding that employees have waived their fundamental rights to select and change bargaining representatives. Indeed, there is no basis to believe that Congress intended that waiver of individual rights to select and change representatives be permitted under any circumstances; while outlawing "yellow dog" contracts for the benefit of management, the Legislature certainly did not intend to weld individual workers to any particular union. Nor did Congress intend that private and unequal agreements should supersede its own design for the representation of employees and the procedures for effecting that representation.

Conclusion

For the foregoing reasons we respectfully submit that the decision of the New York State Court of Appeals should not be disturbed and that it would be inappropriate to grant the instant petition for certiorari.

Respectfully submitted,

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October, 1974